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BEFORE THE FEDERAL ELECTION COMMISSION

2004 JUL 15 1 P 6: 05

IN THE MATTER OF MICHAEL MOORE, LIONS  
GATE ENTERTAINMENT CORP., CABLEVISION  
SYSTEMS CORP., RAINBOW MEDIA HOLDINGS  
LLC, THE INDEPENDENT FILM CHANNEL LLC,  
FELLOWSHIP ADVENTURE GROUP, HARVEY  
WEINSTEIN, BOB WEINSTEIN, SHOWTIME  
NETWORK, INC. AND VIACOM INTERNATIONAL  
INC.,

MUR NO. 5467

**CONFIDENTIAL  
SENSITIVE**

*Respondents.*

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**RESPONSE TO COMPLAINT**

On behalf of Respondents Lions Gate Entertainment Corp., Cablevision Systems Corp., Rainbow Media Holdings LLC, The Independent Film Channel LLC, Fellowship Adventure Group LLC, Harvey Weinstein, and Bob Weinstein, the undersigned counsel hereby responds to the Complaint filed with the Federal Election Commission ("Commission") by Citizens United. This response is submitted pursuant to 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6, and in accordance with the Commission's letter (dated June 30, 2004) to various Respondents.

Respondents respectfully request, for the reasons outlined below, that the Commission find no reason to believe that Respondents have violated or are likely to violate the Federal Election Campaign Act, as amended (the "Act"), and that the Commission take no action on the basis of the Complaint. Absent the existence of a violation of the Act, or facts indicating that a violation of the Act is likely to occur, the Commission should find no reason to believe that further proceedings are warranted in this matter.

## THE COMPLAINT

The Complaint alleges that "planned advertising" for the film *Fahrenheit 9/11* (the "Film") violates the Act. Specifically, the Complaint states that "one or more Respondents will pay a fee to broadcast FAHRENHEIT 9/11 ads that include visual and/or sound clips of President Bush and/or Vice President Cheney on . . . television, cable or satellite facilities" on or after July 31, 2004, and thus allegedly violate the Act by means of making an impermissible corporate "expenditure" for "electioneering communications," as those terms are defined in the Act and Commission regulations. (Cmplt. ¶ 17).

Notably, the Complaint neither alleges that any of the Respondents is currently in violation of the Act, nor does it allege a past violation of the Act. The Complaint identifies no fact or action, or even a reasonable inference from any fact or action, suggesting that a distributor of the Film has developed an advertising strategy that could be said to run afoul of the Act's provisions on electioneering communications.

The baseless allegations of the Complaint can be disposed of very simply: substantially prior to the filing of the Complaint, the distributors of the Film, as more appropriately named and identified below, had made a business determination as part of the marketing plan for the Film and with a view to the legal landscape that, among other things, no funds would be expended for paid advertisements over broadcast, cable, or satellite that would refer to clearly identified candidates for federal office during the period after July 30, 2004 and through November 2, 2004. This fact alone is sufficient justification for the Commission to find no reason to believe that a violation of the Act is likely to occur, and to close the file in this matter.

## THE LAW

The Act, as amended by the Bipartisan Campaign Reform Act ("BCRA"), prohibits the expenditure of corporate funds for paid advertising shown on broadcast, cable, or satellite television within thirty days of a nominating convention or primary for a given federal office, or within sixty days of the general election for such office, if the advertising clearly identifies a candidate for federal office. *See* 2 U.S.C. §§ 434(f)(3)(A), 441b(a), 441e(a); 11 C.F.R. § 100.29(b)(3)(i).

The Act and Commission regulations define an "electioneering communication" to include "any broadcast, cable or satellite communication which —

(I) refers to a clearly identified candidate for Federal office;

(II) is made within —

(aa) 60 days of a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(a).

The Act also provides a series of exceptions from this general definition at 2 U.S.C. § 434(f)(3)(B).<sup>1</sup>

Accordingly, if such communications are not made within the relevant thirty- or sixty-day time period, do not feature a clearly identified candidate for federal elective office, are not

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<sup>1</sup> Respondents take no position for the purposes of this Response on whether a media exemption could or should apply to the advertising for this Film under 2 U.S.C. § 434(f)(3)(B)(i) or other applicable provisions, but reserve their right to seek a Commission Advisory Opinion. Similarly, Respondents take no position for the purposes of this Response on the constitutionality of the Act and Commission regulations as applied to the Film, but expressly reserve all rights to assert such arguments in the future.

paid for with corporate funds, or fall within an available exception, the provisions of the Act that might otherwise penalize the expenditure of such funds are not applicable.

## **DISCUSSION**

### **1. MOST OF THE RESPONDENTS ARE IMPROPERLY NAMED**

On its face, the Complaint incorrectly identifies multiple Respondents. There are only three entities with any connection to the legal issues presented by the Complaint, only one of which is correctly named as a Respondent.

The Fellowship Adventure Group LLC ("Fellowship"), a Delaware limited liability company caused to be formed by Harvey Weinstein and Bob Weinstein and named as a Respondent, holds the worldwide distribution rights to *Fahrenheit 9/11*. Fellowship is a limited liability company treated as a partnership for IRS purposes whose members are individuals. Accordingly, it is not properly treated as a corporation under the Act and Commission regulations. *See* 11 C.F.R. § 110.1(e),(g). United States theatrical distribution rights to the Film are licensed to IFC Films LLC and Lions Gate Films Inc.<sup>2</sup>

IFC Films LLC, a Delaware limited liability company and a licensed United States co-distributor of *Fahrenheit 9/11* and not named in the Complaint, is a sister entity to The Independent Film Channel LLC, a Delaware limited liability company and a named Respondent with no connection to the distribution of *Fahrenheit 9/11*. IFC Films LLC and The Independent Film Channel LLC are owned by Rainbow Media Holdings LLC ("Rainbow"), a Delaware limited liability company, which in turn is owned by Cablevision Systems Corp. ("Cablevision"), a Delaware corporation. The Independent Film Channel LLC, Rainbow, and Cablevision are not

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<sup>2</sup> Accordingly, Harvey Weinstein and Bob Weinstein are not distributors of the Film, and are irrelevant to the issues presented in this matter.

licensed distributors of the Film, have not undertaken any activities to promote the distribution of this Film, and will not undertake any such activities in the future. Accordingly, The Independent Film Channel LLC, Rainbow, and Cablevision should be dismissed from the present matter.

Lions Gate Films Inc., the other United States co-distributor of the Film, is a Delaware corporation and not a named Respondent. Lions Gate Films, Inc. is owned by Lions Gate Entertainment Inc., also a Delaware corporation and not a named Respondent. Lions Gate Entertainment Inc. is in turn owned by Lions Gate Films Corp., a Canadian corporation, which is not named as a Respondent. Lions Gate Films Corp. is in turn owned by Lions Gate Entertainment Corp., a British Columbia corporation that is named as a Respondent. However, Lions Gate Films Inc., a United States corporation, is the only Lions Gate entity licensed to distribute and undertake promotional activities for *Fahrenheit 9/11*, and accordingly is the only Lions Gate entity with any connection to the distribution and advertising of the Film. Lions Gate Entertainment Corp., the only Lions Gate entity named in the Complaint, is the ultimate corporate parent and has no connection with the proceeding at issue before the Commission. Accordingly, Respondent Lions Gate Entertainment Corp. should be dismissed from the present matter.

Fellowship, IFC Films LLC, and Lions Gate Films Inc. (collectively, the "Distributors") retain sole and exclusive control over the United States advertising and marketing for the Film with respect to its theatrical release – and accordingly sole responsibility for the content of any paid advertising for the theatrical distribution of *Fahrenheit 9/11* in the United States.

**2. THE FILM'S DISTRIBUTORS HAVE NOT AND DO NOT INTEND TO DISTRIBUTE "ELECTIONEERING COMMUNICATIONS" WITHIN THE MEANING OF THE ACT**

Key allegations of the Complaint are not in dispute. There is no dispute, for example, that the current advertisements for the Film on television, cable, and satellite that include and have included images of President Bush, Vice President Cheney, and other candidates for federal office are not "electioneering communications" within the meaning of the Act. This is clear on the face of the statute because the "blackout periods" of the statute are not triggered until thirty days before the applicable nominating convention, or specifically July 31, 2004. (Cmplt. ¶¶ 17-18)<sup>3</sup>

There is similarly no dispute that corporate funds have been expended for the Film's advertising, as is the industry norm and custom for movies distributed within the United States. (Cmplt. ¶ 19) But absent the existence of improper electioneering communications involved in the advertising or marketing of this Film, expenditure of such funds for movie advertising presents no issue of federal campaign finance law. The mere existence of corporate funded advertising for a documentary, absent some fact that would raise the issue of electioneering communications, is no basis for a claimed violation of the Act or Commission regulations.

The Complaint's assumed clairvoyance about the Distributor's future activities in relation to the Film is wholly without foundation. (Cmplt. at 1-2 & ¶¶ 17-20) The Complaint cites absolutely no basis – nor could it – for its statements that one or more of the Film's distributors

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<sup>3</sup> For purposes of this analysis, the relevant election events for purposes of computing the applicable blackout periods are the Republican Convention, which begins on August 29, 2004, the general election on November 2, 2004, and other primary or preference elections scheduled prior to November 2, 2004. For example, the thirty day blackout period before the Republican Convention begins to run as of July 31, 2004. With the general election on November 2, 2004, the sixty day blackout period begins to run on September 2, 2004. Thus, the Republican Convention and general election blackout periods are a ninety day span from July 31, 2004, through and including November 2, 2004.

plan to pay with corporate funds for advertising that would refer to any clearly identified federal candidate during the applicable blackout periods.

As is customary in the film industry and acting in their independent business judgment, the Film's Distributors have been changing the advertising for the Film over the course of the Film's release. The initial television advertising for the Film contained many scenes from the Film itself in order to attract audiences interested in seeing more of the Film. Current advertisements for the Film predominantly focus on audience and critical reaction to the Film – as is typical of the marketing evolution attendant to the release of a major motion picture. It is fully consistent with this normal and evolving marketing dynamic for a major movie, and thus easy and effective, to advertise the Film without any reference to a clearly identified candidate for federal office.

As noted above, before the Complaint was filed with the Commission, the Film's Distributors had examined their marketing plans and made the decision that advertisements for the Film carried on broadcast, cable or satellite would (i) exclude references to clearly identified presidential or vice presidential candidates after July 30, 2004 and before November 3, 2004, and (ii) exclude references to clearly identified non-presidential federal candidates in a relevant state or congressional district within thirty days of any relevant primary election, or within sixty days before the general election.

Accordingly, the Complaint is entirely without merit as to the Respondents and/or Distributors. Assertions to the contrary contained in the Complaint are baseless and false.


**CONCLUSION**

For the foregoing reasons, Respondents request that the Commission find that there is no reason to believe that a violation of the Act has occurred or will occur with respect to the allegations of the Complaint, and close the file in this matter.

Date: July 15, 2004

Respectfully submitted,

By: \_\_\_\_\_

  
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